

IN THE MATTER OF	*	BEFORE THE
PIKESVILLE HOSPITALITY INVESTORS, LLC –	*	BOARD OF APPEALS
LEGAL OWNER	*	
TWO FARMS, INC./CANTON CARWASH –	*	OF
DEVELOPER/LESSEE	*	
DRC NO: LIM-2021-00001-C	*	BALTIMORE COUNTY
3 RD ELECTION DISTRICT	*	
2 ND COUNCILMANIC DISTRICT	*	CASE NO: CBA-21-017

* * * * *

OPINION

This matter comes before the Board of Appeals (the "Board") as an appeal of a Limited Exemption Development Plan (the "LEDP") approved by Baltimore County on January 25, 2021 (the "LEDP Approval"). Pikesville Hospitality Investors, LLC, Two Farms, Inc., and Canton Carwash (Petitioner) were represented by Adam M. Rosenblatt, Esquire and David H. Karceski, Esquire of Venable LLP. Afshin Attar and Pikesville Communities Corporation (Protestant), were represented by G. Macy Nelson, Esquire of the Law Office of G. Macy Nelson, LLC. Peter M. Zimmerman, Esquire, appeared on behalf of People's Counsel for Baltimore County.

Petitioner initially filed a Motion for Partial Dismissal and argued that the only issue permitted to be litigated in the *de novo* appeal is the approval of the LEDP. Petitioner asserted that any issues litigated by Protestant relating to the approval by the Development Review Committee (the "DRC") and the approval by the Director of Planning of an "Approved Planned Drive-In Cluster" should be prohibited and barred because they were not timely appealed. Oppositions to Petitioner's motion were filed by the Protestant and Office of People's Counsel. A Renewed Motion was subsequently filed by Petitioner. On November 17, 2022 the Board, after a virtual hearing and public deliberation, granted Petitioner's Motion for Partial Dismissal. Since that time, both the Pikesville Communities Corporation and the Office of the People's Counsel have withdrawn their appeals.

The Board thereafter held two virtual hearings via Webex on the merits of the LEDP on March 21 and March 22, 2023. Before beginning the *de novo* hearing on the merits of the matter, the Board heard arguments on four preliminary motions: Petitioner’s Motion to Quash Subpoena, County’s Motion to Quash Subpoena, Protestant’s Motion to Modify Schedule, and Protestant’s Motion to Re-Schedule. In essence, both Petitioner and the County argued that the subpoena requests were barred by the Board’s decision of November 17, 2022 cited above. The County, represented by Bambi Glenn, Assistant County Attorney, Office of Law, on behalf of former Councilwoman Vicki L. Almond, also argued that the Councilwoman did not have any such documents in her possession and that the Councilwoman has legislative immunity in this matter. Protestant argued that County Council Bill 53-18 was a predicate to this appeal, and that the aforementioned bill was a “special law”. Protestant’s other two motions requested the Board to have oral arguments on their motions, to postpone these hearings, and to have in-person hearings on these matters. Part of Protestant’s rationale was their intention to submit numerous exhibits which would be better presented in person. Petitioner argued that the postponement would cause further delay, the request for a change in schedule was not timely, and that seven witnesses were prepared to testify, as scheduled. The County stated that Councilwoman Almond was not available at this time.

The Board then held a public deliberation on the four preliminary matters. The Board determined to grant both Motions to Quash and to deny the Protestant’s Motion to Modify Schedule and Motion to Reschedule. The Board found that its previous determination regarding County Council Bill 53-18 precludes arguments on this matter and that the subpoenas seek information not relevant to the merits of this case. Further, the Board found that time for oral arguments on preliminary matters had been given at the beginning of these hearings.

Additionally, the Board found that the timeliness of the request to have in-person hearings was not adequate under the Board's Rules and holding these hearings as scheduled would not prejudice either party. Following announcement of the above decision the parties agreed that Petitioner would present their case on March 21 and Protestant would present its case beginning on March 22, 2023.

PETITIONER'S CASE

Petitioner presented six witnesses representing various Baltimore County agencies: Rocelle Enrice, Real Estate Compliance; Jenifer Nugent, Development Review; Michael Viscarra, Project Engineer Permits; Mitch Kellman, Zoning Review; Jeffrey Livingston, Development Coordination Division; James Hermann, Development Plans Review and Recreation and Parks. These witnesses all testified that their agencies have reviewed and approved the plans for this LEDP.

Mr. Stephen Warfield, President of Matis Warfield, Inc. also testified for Petitioner. Mr. Warfield was accepted, without objection, as an expert in engineering with knowledge of the Baltimore County Zoning Regulation and Laws. Mr. Warfield described in detail the plan for this development. He explained that the site currently has a hotel. The proposal is to have a Royal Farms convenience store, gas station, and car wash at the location. Mr. Warfield outlined the layout of the site including traffic flow, parking, and landscaping. He stated that no zoning variances were necessary at this time. Additionally, Mr. Warfield said that the plan met all requirements of the Baltimore County Code and all relevant County agencies had approved the plan. During cross-examination, Mr. Warfield stated he did not recall if he participated in drafting language for County Council Bill 53-18. He also stated that he began working on this particular project in September 2018.

Petitioner submitted seventeen Exhibits to the Board, which were admitted without objection.

PROTESTANT'S CASE

Mr. Alan Zuckerberg, former President of the Pikesville Community Coalition, testified before the Board. He stated that he had no idea that County Council Bill 53-18 (reference above) was passed. He also stated that he opposed this development. Mr. Zuckerberg does not currently live in the area.

G. Macy Nelson, Esquire submitted three stipulations on behalf of Protestant (Exhibits 29, 30 and 31). The stipulations were given by Afshin Attar, David Cho, and Imani Chinsano in opposition to the development. These stipulations were voluntarily submitted in lieu of those persons testifying before the Board and without objection by Petitioner. Additionally, Protestant offered Exhibit 25 (aerial photo) and Exhibit 27 (Cho deed) into evidence, without objection.

Protestant submitted Exhibits 1 through 24-01-59 for identification to the Board. Petitioner objected on the grounds that these Exhibits were not relevant and related to the issue previously decided by the Board, namely County Council Bill 53-18. The Board sustained Petitioner's objection.

Protestant also requested that Exhibit 28 be admitted into evidence. The Exhibit was one page of a two-page filing through the State Department of Assessments and Taxation. Protestant argued that Pikesville Hospitality Investors, LLC was not a business in good standing and had forfeited its charter. Petitioner objected to the Exhibit, stating the Two Farms, Inc. was in good standing and this Exhibit was not previously presented to counsel or the Board. The Exhibit was admitted and will be given proper consideration. Protestant stated that the second page of the Exhibit would be provided to the Board. On March 28, 2023 Protestant sent the second page of

the Exhibit to the Board. On the same day, Petitioner submitted a letter and referred the Board to Petitioner's Exhibit 17 which shows Two Farms, Inc. to be in good standing with the Department of Assessments and Taxation.

The parties submitted closing memoranda on April 17, 2023. Included in Protestant's memoranda was a Motion to Reconsider along with an argument regarding standing. Petitioner filed a response to Protestant's Motion to Reconsider. The Board held a Public Deliberation on April 27, 2023 to consider this matter

STATEMENT OF FACTS

On June 4, 2018, the Baltimore County Council passed Bill 53-18, which: (1) amended the definition of a "Drive-In Cluster, Planned" contained in § 101.1 of the Baltimore County Zoning Regulations ("BCZR"); and (2) amended § 405.4 of the BCZR to provide that a full-service car wash is permitted by right in combination with a fuel service station if the project is located in a Planned Drive-In Cluster. *See* Bill 53-18, attached to the First Appeal. Following the enactment of Bill 53-18, the definition of a Planned Drive-In Cluster was amended to read as follows:

An integral commercial development for which an overall plan has been approved by the Department of Planning and which meets the following criteria for Type 1 or Type 2:

- A. Type 1: Is under common ownership or control; is on a site at least three acres in net area; has at least 500 feet of lot frontage on arterial streets; and is devoted primarily to drive-in uses or other vehicle-oriented establishments, with vehicular access to any use in the development solely from service drives on the site.
- B. Type 2: Is under common ownership or control; is on a site at least 2.5 acres in net area; has at least 250 feet of frontage on an arterial street; has vehicular access to an arterial street within 300 feet of the right-of-way of an interstate highway; and is devoted primarily to drive-in uses or other vehicle-oriented

establishments, with vehicular access to any use in the development from service drives on the site.

(BCZR § 101.1.)

Petitioner applied for approval for the redevelopment of the property known as 1721 Reisterstown Road with a fuel service station, full-service car wash, and a convenience store/carryout restaurant.

On September 18, 2018, the Director of the Department of Permits, Approvals and Inspections ("PAI") issued a written letter accepting the recommendation of the DRC to approve a Limited Exemption under § 32-4-106(b)(8) of the Baltimore County Code ("BCC") for this project (the "DRC Approval"). No appeal was taken to the DRC Approval.

In November 2018, the Director of Planning issued an approval letter and signed a Planned Drive-In Cluster Plan confirming that the project is "Approved as a Planned Drive-In Cluster, Type 2, pursuant to BCZR Section 101.1" (the "Planned Drive-In Cluster Approval"). No appeal was taken to the Planned Drive-In Cluster Approval.

In the fall of 2020, the project was presented to the Baltimore County Design Review Panel ("DRP"), which issued a recommendation approving the design of the project on October 28, 2020. On November 13, 2020, pursuant to BCC § 32-4-203(1), the Director of PAI, as designee for PAI, the Department of Planning ("DOP"), and the Department of Environmental Protection and Sustainability ("DEPS"), formally accepted the DRP's recommendation and approved the design of this project (the "DRP Approval"). No appeal was taken to the DRP Approval.

On January 25, 2021, the LEDP Approval was issued, formally determining that the LEDP had been approved. The First Appeal to the LEDP approval by Protestant was filed on February 16, 2021, and the Second Appeal was filed on February 17, 2021.¹

¹ As previously stated, the Office of People's Counsel dismissed their appeal on or about May 4, 2022.

LAW

The Express Powers Act, MD Code Ann., L.G., §10-305(b) (formerly Article 25A) controls the Board's jurisdiction to hear cases as follows:

(b) Jurisdiction. – The county board of appeals may have original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county government over matters arising under any law, ordinance or regulation of the county council that concerns:

- (1) an application for a zoning variation or exception or amendment of a zoning map;
- (2) the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order; or
- (3) the assessment of any special benefit tax.

Consistent with the Express Powers Act, the County Charter, §602, sets forth the functions and powers of the Board as follows:

The county board of appeals shall have and may exercise the following functions and powers:

(a) *Appeals from orders relating to zoning.* The county board of appeals shall have and exercise all the functions and duties relating to zoning described in Title 10 of the Local Government Article of the Annotated Code of Maryland as such functions and powers may be prescribed by legislative act of the county council. All references in law to the board of zoning appeals shall be construed to refer to the county board of appeals. In all cases, except those excluded by this Charter or by legislative act of the county council, the order of the county board of appeals shall be final unless an appeal is taken therefrom in the manner provided in Section 604 of this Article.

(b) *Appeals from orders relating to licenses.* The county board of appeals shall have and exercise all the functions and powers of the board of license appeals as such functions and powers are prescribed in the public local laws of the county in effect at the time of the adoption of this Charter. All references in said laws

to the board of license appeals shall be construed to refer to the county board of appeals created by this article. As soon as the county board of appeals has been duly constituted by the appointment and qualifications of its members as herein provided, the board of license appeals shall cease to exist.

(c) *Appeals from orders relating to building.* The county board of appeals shall hear and decide all appeals from orders relating to building.

(d) *Appeals from executive, administrative and adjudicatory orders.* The county board of appeals shall hear and decide appeals from all other administrative and adjudicatory orders as may from time to time be provided by Title 10 of the Local Government Article of the Annotated Code of Maryland, as amended, or by legislative act of the county council not inconsistent therewith.

(e) The county board of appeals shall have original and exclusive jurisdiction over all petitions for reclassification.

In order to streamline and facilitate the development process, the Director of PAI, under the authority granted in the BCC, created the DRC. The DRC is an informal group consisting of representatives of PAI, the Department of Public Works, the Department of Recreation and Parks, the Department of Environmental Protection and Sustainability, and the Department of Planning. The DRC is chaired by a representative of PAI. The DRC reviews proposed plans and formulates recommendations to the Director of PAI on requests for limited exemptions under BCC § 32-4-106(a) and (b). The DRC's recommendations are reviewed and either adopted, or not, by the Director of PAI. Decisions of the Director of PAI are final decisions, which are directly appealable to this Board under the holding in *UPS v. People's Counsel*, 336 Md. 569 (1994).

Appeals to this Board are governed by Rule 3 of the Rules of Practice and Procedure of the Baltimore County Board of Appeals. Rule 3.C states as follows:

All appeals to the Board of Appeals shall be made within thirty (30) days from the date of the final action appealed, unless otherwise provided by County Code.

Additionally, BCC § 32-3-401 states that a person feeling aggrieved by a decision of the Director of PAI may appeal the decision or order to this Board. Notice of the appeal shall be filed, in writing, “within 30 days after the final decision.” *See* BCC § 32-3-401(c). This section has been held to authorize the appeal of a limited exemption approval if filed within thirty (30) days of the issuance of the decision. *Beth Tfiloh Congregation of Balt. City, Inc. v. Glyndon Cmty. Ass'n*, 152 Md. App. 97, 108 (2003).

DECISION

The Board has considered the evidence presented at the hearings including the testimony and demeanor of the witnesses, exhibits, and stipulations. The Board also reviewed the memoranda submitted and the response thereto. In its deliberation the Board made the following determinations regarding the three matters it considered.

I. Motion for Reconsideration Denied

Protestant untimely moved this Board to reconsider its prior ruling that the Planning Director’s approval letter in November 2018 was a final appealable order. Protestant has once again missed the statutory timeframe for challenging an administrative decision issued by Baltimore County. By Protestant’s own admission, the Board issued its written decision declining to review the 2018 Planned-Drive-In Cluster Approval on November 17, 2022. (*See* Attar Memo/Motion, p. 5.) This motion for reconsideration was filed on April 17, 2023, five months after the Board’s Order. (*Id.* at p. 8. 2.) Rule 12.A of the Board’s Rules of Practice and Procedure states that a Motion for Reconsideration “shall be filed within thirty days after the date of the original order” (emphasis added). Rule 12.A contains mandatory language (“shall”) and legally prohibits the Board of Appeals from entertaining this Motion for Reconsideration. As stated in

BCC § 1-2-209, to which the Board’s Rules are an Appendix, “the word ‘shall’ shall have a mandatory effect and establish a requirement.”

Furthermore, the Supreme Court of Maryland case Protestant references does not shed any light on the substance of his claim as it interprets the finality of a legislative/statutory process specific to Prince George’s County. (*See Town of Upper Marlboro v. Prince George's Cty. Council*, 480 Md. 167 (2022).) Indeed, the non-final resolution in that case was actually entitled “initiating resolution” and the Court appropriately found “there was more work for the Council to do before enacting the minor amendment.” (*Id.* at 222.) Here, the Board has already found that the Planned Drive-In Cluster argument was the final say on that issue, immediately conveyed rights to the Petitioner (the proposed uses are now permitted by right on the property), and cannot be revisited years later by the Board.

The Board has declined to address this argument on multiple occasions and will not revisit its decisions through an untimely Motion for Reconsideration that does not raise newly discovered evidence or a change in law. Indeed, the case that is cited reiterates that the rule of finality has been applied to land use decisions in a multitude of cases dating back to 1980. (*Id.* at p. 184.) There is nothing new in the case he now cites.

Accordingly, the Board denies the untimely Motion for Reconsideration.

II. Applicant Two Farms, Inc. Has Standing

Protestant has attempted to argue that Two Farms, Inc., who was the “applicant” for the LEDP, is not authorized to apply for approval of a development plan. It is unclear if Protestant raises this issue in the motion for reconsideration and or in opposing the development. To the extent standing may be raised at any time – it was first raised at the conclusion of the merits hearing and again in Protestant’s post-hearing memorandum – Two Farms, Inc. is the contract

purchaser of the property in question, which squarely meets the definition of an “Applicant” in BCC § 32-4-101(e). Protestant has made a blanket statement without any supporting evidence that “Two Farms, Inc. is neither the owner nor the contract purchaser.” (Memo/Motion p. 4.) For the sake of judicial economy, the Board concludes that Two Farm, Inc. has standing to proceed.

III. LEDP Approval

The Petitioner presented substantial evidence of compliance with all applicable regulations for LEDP Approval. At the Board’s Hearing, representatives of each of the County agencies responsible for reviewing and commenting on the LEDP appeared and, after confirming compliance with all applicable rules and regulations, stated that their agency approved the LEDP, which was introduced as Petitioner’s Exhibit 1A-E, 5. Specifically, County representatives appeared on behalf of Real Estate Compliance, Development Plans Review (“DPR”), the Department of Planning (“Planning”); the Office of Zoning Review (“Zoning Office”); the Department of Environmental Protection and Sustainability (“DEPS”), the Department of Recreation and Parks, and the County’s Landscape Architect. Testimony and evidence confirmed that all agencies, including the State Highway Administration, Fire Marshal’s office, and House Numbers, recommended approval of the LEDP. (See Agency approvals, Petitioner’s Exhibits 6-16.) Having obtained confirmation from all reviewing agencies that the LEDP meets all regulations, Petitioner successfully established a presumption that the LEDP meets all regulations. (See BCC § 32-4-229(b)(1); see also *Elm Street*, 172 Md. App. at 696.) Indeed, it is “well settled that an agency’s interpretation of its own administrative regulation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” (See *Beth Tfiloh Congregation of Balt. City, Inc. v. Glyndon Cmty. Ass’n*, 152 Md. App. 97, 105 (2003) (citing *Ideal Fed. Savings Bank v. Murphy*, 339 Md. 446, 461 (1995); *Morris v. Prince George’s County*,

319 Md. 597, 614, (1990).) Mr. Warfield supplied additional, substantial evidence of the LEDP's compliance by providing additional detail about the LEDP and explaining how it meets various requirements related to zoning, planning, public works, and other applicable land use issues.

Protestant has not identified any issue that would prevent approval of the LEDP. Protestant's counsel admitted that he intended to focus his case on the legality of the Planned Drive-In Cluster legislation. After the Board determined that the legislation was not at issue in this case, Protestant did little to contest the LEDP's compliance with the County regulations. Indeed, the only named Protestant in this case is a rival fuel service station owner, Afshin Attar. Both People's Counsel and the Pikesville Communities Corporation withdrew from the case prior to the public hearing before the Board. The written stipulations, which were the only substantive evidence presented by the Protestant, do not provide any basis for denial of the LEDP. Three written stipulations were marked and accepted into evidence as Protestant's Exhibits 29-31. The stipulations complain of typical development impacts such as the potential increase in traffic, noise, and lights. These stipulations did not provide any basis for the Board to deny the LEDP, which was approved by the agencies that review proposed developments for compliance with the regulations concerning traffic, landscaping and lighting. Additionally, Mr. Warfield explained that no zoning variances are required for this project, and compliance with all site-specific requirements for both the fuel service station and car wash uses is detailed on the first page of the LEDP. (*See* Petitioner's Exhibit 1A.) The Protestant's stipulations did not counter the Petitioner's substantial evidence that the LEDP complies with the development regulations.

Finally, as said above, the Protestant's late effort to defeat the LEDP by introducing an incomplete printout from the SDAT website showing that the owner of the Property, Pikesville Hospitality Investors, LLC, was "not in good standing" as of two weeks prior to the hearing does

not defeat the development. Protestant's counsel proffered at the hearing, and Petitioner submitted as its Exhibit 17, proof that the Petitioner, Two Farms, Inc., is in good standing with SDAT. Protestant's counsel was supposed to supplement his Exhibit 28 with the SDAT printout for Two Farms, Inc. but instead authored a letter on March 28, 2023 including a page that does not confirm the corporate status of Two Farms, Inc. Petitioner responded by submitting the corporate status of Two Farms, Inc. as its Exhibit 17. The Appellate Court of Maryland has made clear that courts can take judicial notice of public records available on SDAT's website. (*See Price v. Upper Chesapeake Health Ventures*, 192 Md. App. 695, 706 n.11 (2010) (taking judicial notice of public records on SDAT's website); *Cohen v. Feldman*, No. 2665, 2020 Md. App. LEXIS 713, at *2 n.4 (July 20, 2020).) A review of the LEDP confirms that the applicant and developer is Two Farms, Inc., not Pikesville Hospitality Investors, LLC. (*See* Exhibit 1A-E.) Indeed, Two Farms, Inc. is the entity that signed the LEDP, not Pikesville Hospitality Investors, LLC. Protestant's attempt to defeat the LEDP on a technicality does not provide any basis for the Board to deny the LEDP.

ORDER

THEREFORE, it is this 12th day of May, 2023, by the Board of Appeals for Baltimore County,

ORDERED, that the Motions to Quash Subpoenas filed by counsel for Petitioner's and by the County on behalf of former Councilwoman Vicky L. Almond is hereby **GRANTED**; and it is further

ORDERED, that Protestant's Motion to Modify Scheduling Order is hereby **DENIED**; and it is further

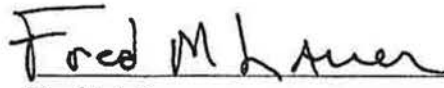
ORDERED, that Protestant's Motion to Reschedule and hold in person hearings is hereby **DENIED**; and it is further


ORDERED, that Protestant's Motion to Reconsider is hereby **DENIED**; and it is further

ORDERED, that the January 25, 2021 approval by Baltimore County for a Planned Drive-In Cluster/Limited Exemption Development Plan at 1721 Reisterstown Road is hereby **GRANTED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Fred M. Lauer


Bryan T. Pennington

Adam T. Sampson was a Board member and participated in the hearings and deliberation of this matter. Mr. Sampson was not reappointed to the Board and his term expired effective April 30, 2023.



Board of Appeals of Baltimore County

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May 12, 2023

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RE: In the Matter of: *Pikesville Hospitality Investors, LLC – Legal Owner*
Two Farms, Inc. / Canton Carwash – Developer/Lessee
Case No.: CBA-21-017

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington" followed by a small flourish.

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letter

c: See Distribution List following

In the matter of: Pikesville Hospitality Investors, LLC – Legal Owner
Two Farms, Inc. / Canton Carwash – Developer/Lessee

2

Case No.: CBA-21-017

Distribution List

May 12, 2023

Pikesville Hospitality Investors, LLC

John M. Kemp, President/Two Farms, Inc./Canton Carwash

Afshin Attar

Alan P. Zukerberg, Esquire

Ryan Coleman, President/Randallstown NAACP

Office of People's Counsel

Paul M. Mayhew, Managing Administrative Law Judge

Stephen Lafferty, Director/Department of Planning

Lloyd Moxley, Development Manager/PAI

C. Pete Gutwald, Director/PAI

James R. Benjamin, Jr., County Attorney/Office of Law